

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

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4 ART+COM INNOVATIONPOOL GmbH : CA NO. 14-217-TBD
5 :
6 Plaintiff, : May 2, 2016
7 :
8 v. : 2:00 O'clock p.m.
9 :
10 GOOGLE INC. :
11 :
12 Defendant, :
13:

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16 TRANSCRIPT OF STATUS CONFERENCE
17 BEFORE THE HONORABLE RICHARD G. ANDREWS
18 UNITED STATES DISTRICT JUDGE

19

20

21 APPEARANCES:

22

23 For Plaintiff: FARNAN LLP

24 BY: BRIAN E. FARNAN, ESQ

25

-and-

1 BAKER BOTTS LLP

2 BY: SCOTT F. PARTRIDGE, ESQ

3 BY: LARRY G. SPEARS, ESQ

4 BY: M. NATALIE ALFARO, ESQ

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7 For Defendant: MORRIS, NICHOLS, ARSHT & TUNNELL

8 BY: PAUL SAINDON, ESQ

9 -and-

10 O'MELVENY & MYERS LLP

11 BY: DARIN W. SNYDER, ESQ

12 BY: DAVID S. ALMELING, ESQ

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23 Court Reporter: LEONARD A. DIBBS

24 Official Court Reporter

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1 P R O C E E D I N G S

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3 THE COURT: Good afternoon.

4 (All counsel responded, "Good afternoon, your Honor.)

5 THE COURT: For the records this is a status conference
6 in Art+Com Innovationpool versus Google, District of Delaware,
7 14-217.

8 And I've been designated to sit as the trial judge in
9 this case. And with me is my law clerk, David Yen.

10 This is being recorded by equipment from the Court of
11 Federal Claims and eventually will be forwarded to Mr. Dibbs,
12 Judge Andrews' Court Reporter, and he will transcribe it.

13 Why don't we begin by asking counsel to identify
14 themselves for the record.

15 MS. FARNAN: Good afternoon, your Honor. Brian Farnan
16 on behalf of the plaintiff. And with me is Scott Partridge from
17 Baker Botts.

18 MR. PARTRIDGE: Good afternoon, your Honor. This is
19 Scott Partridge. I also have Gene Spears and Natalie Alfaro
20 with me as well.

21 MR. SAINDON: Good afternoon, your Honor. Is Paul
22 Saindon behalf of Google.

23 With me Darin Snyder and David Almeling from O'Melveny
24 & Myers.

25

1 MR. SNYDER: Good afternoon, your Honor.

2 That was all.

3 THE COURT: That was you will. This is Darin Snyder.
4 I've already been introduced.

5 THE COURT: Good.

6 I just ask to avoid confusion here that there be one
7 Delaware counsel and one other counsel speaking for each side in
8 our status conference call. And if you could identify who that
9 is going to be each time you say something, I think you need to
10 proceed it by saying your name so that the court reporter can
11 record it accurately.

12 Who's going to speak for ART+PLUS?

13 MS. FARNAN: Your honor, Delaware counsel, Brian
14 Farnan.

15 MR. PARTRIDGE: Other counsel is Scott Partridge.

16 THE COURT: Okay. And for Google?

17 MR. SAINDON: Delaware counsel, Paul Saindon.

18 THE COURT: Yes.

19 MR. SNYDER: The other counsel will be Darin Synder.

20 THE COURT: Okay.

21 I think the first order of business here is to see if
22 it is possible to have the Pretrial Conference on May 13th, here
23 in Washington.

24 Is there any objection to doing that?

25 MR. PARTRIDGE: Plaintiff is fine with that.

1 MR. SNYDER: Google is also fine with that.

2 THE COURT: To make it as convenient as possible, let
3 me ask. What would be a good time to start the Pretrial
4 Conference, would it be good for you or the people that are
5 coming in from out of town to prefer to have it later?

6 MR. PARTRIDGE: Your Honor, we'll be coming in from out
7 of town.

8 But I think we'll need to come in the night before no
9 matter what time you start the hearing. 10 o'clock in the
10 morning is fine for us.

11 MR. SNYDER: Counsel for Google is in a similar
12 situation. A 10 o'clock start time sounds fine.

13 THE COURT: Good.

14 It will be in courtroom 203 at the Federal Circuit.

15 Now, I gave you the agenda with a number of different
16 items on it.

17 I don't necessarily want to make conclusive rulings
18 about this today. But I thought it would be useful to review
19 some of the items so that in preparing your draft Pretrial
20 Order, you can take account of what my preferences are.

21 So, in terms of the hours of trial time, obviously,
22 this case is scheduled to be completed during a single week.
23 And it will be important to give the jury time to deliberate so
24 that they can be finished, if possible, before the Memorial Day
25 weekend.

1 How many hours of trial time does each side anticipate
2 needing, that is exclusive of opening and closing arguments?

3 MR. PARTRIDGE: Your Honor, I know the schedule for
4 this trial is a little bit different than the norm. That
5 occurred because of a compromise that the parties entered into
6 to accommodate a conflict that Mr. Snyder had with a trial
7 originally scheduled to start on May 16th. And the idea was to
8 do the evidence from Monday through Thursday. I think that's
9 the 23rd through the 26th, if I got my calendar dates correctly.

10 And Judge Andrews normally has about 6 hours worth of
11 time each day with the jury.

12 So our calculation has always been that it would be 12
13 hours per side including the opening, but excluding the
14 closings, which are scheduled to take place on that following
15 Friday morning.

16 So, we would suggest 12 hours per side including a 30
17 minute opening for each side.

18 THE COURT: And what about defendant?

19 Hold on a one second. What's the proposal with respect
20 to the closing argument?

21 MR. PARTRIDGE: Your Honor, we want to do the closings
22 to make sure they're done in the morning so the jury can start
23 deliberating first thing in the afternoon.

24 In fact, if we can limit the closings to maybe an hour,
25 to an hour-and-a-half so that we can finish, I think ideally it

1 would be nice to finish closings in the morning, to have the
2 instructions prior to the closings, which Judge Andrews has told
3 us he was going to do.

4 Whether we could do that Thursday afternoon at the end
5 of the trial day and do the instructions first thing in the
6 morning, but I think our objective ought to be to finish
7 everything so the jury has the case by noon on that Friday so
8 they can begin the deliberating process.

9 So, we're fine with maybe setting that amount of time
10 during the course of trial, but we're thinking it's more like an
11 hour, maybe an hour and 15 minutes. I don't know that it needs
12 to go as long as an hour and 30 minutes, but something like an
13 hour and 15 minutes should probably be sufficient for this case.

14 THE COURT: Okay. The other side?

15 MR. SNYDER: Thank you, your Honor.

16 When we set the trial to start on May 23rd, Judge
17 Andrews had a family obligation and conflict on Friday that we
18 were working around.

19 Now that your Honor is going to preside over trial, we
20 maybe free of that limitation. And it maybe prudent to extend
21 the case a little bit longer than perhaps Judge Andrews had
22 contemplated.

23 We think 15 hours per side exclusive of openings and
24 closings would be an appropriate amount of time. There are a
25 significant number of issues on both infringement and validity.

1 We're largely in agreement with plaintiffs on the
2 length of the openings and closings. 30 minutes should
3 sufficient be for the opening. I think 60 minutes or perhaps
4 just a little bit more than that should be adequate for
5 closings.

6 I like to get some guidance on how the plaintiff might
7 be allowed to use their time on rebuttal. I think the
8 difference right now is the amount of time for the witnesses.
9 We request 15 hours per side.

10 THE COURT: Okay. Well, my inclination now is to go 12
11 hours including a 30 minutes for openings and an hour for the
12 closings.

13 If, when, we have the Pretrial Conference, you want to
14 ask me to reconsider that, I would be open to addressing it
15 again. But for the moment, let's go with 12 hours including a
16 30 minute opening and then a separate one hour per side for the
17 closing. So that we can get it to the jury by noon time on that
18 Friday.

19 MR. SNYDER: Does your Honor have rules regarding the
20 amount of time that can be used for rebuttal?

21 As a defendant, we're always paranoid about the
22 plaintiff giving up a two minute initial closing and then
23 reserving all of their time for rebuttal when we don't get to
24 respond to it.

25 THE COURT: I'm not inclined to have a rebuttal. But

1 at the same time, I am not going to permit sandbagging. So
2 there's a huge amount of time reserved for the plaintiff. We
3 can address that at the Pretrial Conference if there are
4 concerns about it.

5 MR. SNYDER: Thank you, your Honor.

6 THE COURT: Now, where are you on the jury
7 questionnaire? Are you going to ask for one?

8 MR. PARTRIDGE: No, we are not asking for one. And I
9 have not heard that Google is asking for one either.

10 I thought the answer to this question on your agenda
11 was going to be no. I'd be interested, obviously, in hearing
12 from getting Google. We've heard nothing about a jury
13 questionnaire up until now. Of course, we have voir dire
14 questions that are on May 11th to the Court.

15 MR. SNYDER: Your honor, we would like to ask a simple
16 questionnaire. We think that it could make voir dire process
17 more efficient. We can provide a draft of that promptly.

18 THE COURT: Well, what I'd suggest is that both sides
19 sit down and go over the draft.

20 As with judge Judge Andrews, I would want questions to
21 ask of the potential jurors what connections they had with the
22 case. That will happen at the voir dire.

23 I wouldn't want any of the questions to be intrusive
24 either. With that guidance, you can come up with a proposed
25 questionnaire. I'd suggest that you submit that, let's see, by

1 the end of week -- by the end of this week.

2 MR. PARTRIDGE: Your Honor, we're happy to engage in
3 that discussion with Google. But this comes as a bit of
4 surprise to us that they now want a questionnaire.

5 And I will say that my initial reaction is to raise the
6 question of a questionnaire this short a time prior to trial is
7 something we're probably going to object to, but I'm happy to
8 look at what they had in mind and respond to it and then address
9 it at the Pretrial Conference.

10 THE COURT: All right. Why don't we schedule that as
11 an item for the Pretrial Conference.

12 If there is going to be a proposed draft or agreed
13 draft of a jury questionnaire, I want to see that together with
14 the proposed Pretrial Order.

15 MR. SNYDER: We will provide ACI's counsel with a draft
16 quickly in the hopes of reaching as much resolution as possible
17 and submitting it your Honor at end of the week.

18 MS. FARNAN: This may create a logical issue.

19 Typically, when a party wants a jury questionnaire,
20 they submit it far in advance so the Clerk's Office wants to be
21 submitted, sends it out to the jury with the Court's own
22 questionnaire that the parties get two days before trial where
23 the jurors -- have the jurors answer standard questions. I
24 think that time may have passed. It may be a issue in the
25 Clerk's Office. It may not be. I just want to raise that issue

1 for your Honor.

2 To raise that, for your Honor.

3 THE COURT: I will take that into consideration as to
4 whether there will be a jury questionnaire.

5 One solution to that would be to have the potential
6 jurors fill out the questionnaire on the day of the voir dire.

7 MR. FARNAN: Yes, that should possible, your Honor.

8 THE COURT: As I say, get me the draft by this Friday
9 with any objections that exist to it so I can consider it.

10 All right. I do intend to allow the jury to ask
11 questions using the procedure that I adopted in the earlier
12 Delaware case that I sat on and the Stragent case that I sat on
13 in Texas.

14 Those two cases are the Immersion Corporation versus
15 HTC case, which in Delaware is 12-CV-259.

16 The Stragent versus Intel, which was ED Texas, case
17 number 11-CV-421 four 21.

18 Does either side object to my allowing the jury to ask
19 questions?

20 MR. PARTRIDGE: We have no objection to that. We'll be
21 interested in looking at those procedures that you put in place.

22 MR. SNYDER: No objection.

23 THE COURT: Okay. Good.

24 And then with respect to jury notebooks.

25 Again, if you look at those cases, they describe what

1 should be in the jury notebooks. So I think that when you come
2 up with the proposed Pretrial Order, you should come up with a
3 proposed draft of the jury notebooks also.

4 MR. PARTRIDGE: That is included as one of the items in
5 the draft Pretrial Order that we've been exchanging, which are
6 due at the end of the week.

7 Are you suggesting, your Honor, that the two cases you
8 identified in the Stragent and the Immersion case, that there is
9 an Order regarding jury notebooks that might be of use to us?

10 THE COURT: Yes.

11 MR. PARTRIDGE: Yes, okay. We'll look at those as
12 well. I'm not familiar with those.

13 THE COURT: All right. Moving on to the question of
14 claim construction, disputes now that Judge Andrews has decided
15 on Summary Judgment Motions. It is likely that we will face
16 anymore claim constructions disputes before trial?

17 MR. PARTRIDGE: Your Honor, we are not aware of any
18 claim construction disputes that you need to address.

19 MR. SNYDER: We're not aware of any claim construction
20 disputes to be addressed either.

21 If I could flip back momentarily to the previous agenda
22 today on jury notebooks? There's one issue that we will ask the
23 Court to decide about the content of those notebooks, unless we
24 get guidance from you today, and, that, whether we can include
25 the principle pieces of prior art on which we rely for our

1 invalidity argument?

2 MR. PARTRIDGE: That is a dispute between the parties.

3 But I think it's best for us to both look at the Orders
4 you've entered in those other cases and take into account and
5 the Pretrial Order that we're going to be submitting to the
6 Court on May 6th, this Friday. Excuse me, May 9th.

7 THE COURT: The notebooks that had in the other two
8 cases did not include the prior art, which presumably will be
9 made into exhibits in the case, correct?

10 I think I'm not inclined to include the prior art in
11 the jury notebooks, but again, you can ask me to consider that
12 at the pretrial.

13 MR. SNYDER: Thank you, your Honor.

14 THE COURT: We'll have it on the agenda for pretrial
15 conference.

16 The next item is possible tech-tutorial. Is that
17 something the parties would think would be useful?

18 MR. PARTRIDGE: I have a suggestion for you that might
19 be helpful to bring you up to speed a bit on the technology.

20 We did not do a technology tutorial for Judge Andrews
21 for the Markman Hearing or at any other time. So there isn't
22 anything you might say in the can that we can use.

23 However, the technical experts for both sides wrote in
24 the background section of their respective reports, summaries of
25 the technology that is at issue here. And frankly, I think both

1 experts did a pretty good job of providing an explanation of the
2 basic technology.

3 What I would suggest as a starting point for your
4 Honor, might be that the parties provide you with not obviously
5 the whole expert reports, they are too long, but just those
6 portions that describe the technology background. And then once
7 you have a chance to look at those, if you think you require
8 more, or want to have a dialogue perhaps at the Pretrial
9 Conference about the technology, we can certainly accommodate
10 your needs at that point.

11 THE COURT: What is Google's position about that?

12 MR. SNYDER: This is the first time first I heard of
13 that proposal. I haven't looked at those summary sections with
14 this purpose in mind.

15 We'd be happy to provide a particular tutorial for the
16 Court if you think it would be helpful. The lawyers would be
17 prepared to do that at the time of the Pretrial Conference.

18 I can quickly go back and look at those summaries and
19 see if we agree they would be appropriate and perhaps let your
20 clerk no later than today or early tomorrow if we think that
21 would be appropriate.

22 THE COURT: Why don't you do that. Let him know by
23 noon tomorrow, let's say, and assuming they would be useful, why
24 don't you got together and send them to me as a package here in
25 the Federal Circuit?

1 The next item that I had was the Charge Conference.

2 As you'll see from the previous cases, I do want either
3 the preliminary jury instruction or the final jury instructions
4 to be filled with boilerplate, which potentially would confuse
5 the jury as to what the issues are.

6 If you take a look at the Charge Conferences that I
7 adopted in those two cases, I think that will give you guidance
8 to come up with proposals for the Pretrial Order and for your
9 later drafts of the charge.

10 MR. PARTRIDGE: May I ask you a question about that?

11 THE COURT: Yes.

12 MR. PARTRIDGE: We're in the process of exchanging
13 instructions.

14 We've provided our proposed instructions to Google, and
15 we're waiting to get their response in next number of days. I
16 don't recall exactly when their due to us.

17 One of the things we did is, we tried to track where
18 relevant the Federal Circuit Bar Associations latest version of
19 jury instructions.

20 Do you find those to be too boilerplate? I'm trying to
21 get some sense of what you mean by boilerplate.

22 Obviously, one can look at those instructions in the
23 other cases and tell, but it would be helpful to know if you
24 consider those too boilerplate.

25 THE COURT: I haven't reviewed them to comment enough.

1 I think if you look at the preliminary instructions in
2 the two prior cases and the final instructions in the Stragent
3 case, that will give you some guidance as to what I'm thinking
4 about.

5 I want to direct the instructions to the actual case
6 that is before the jury rather than give them instructions which
7 don't bear any necessary relationship as to what's going on.

8 For example, if there is an issue of invalidity, if
9 there is anticipation, I want to point them to the anticipatory
10 references, obviously. I also want to point them to the
11 disputes between parties as to what they should be focusing on
12 as to what the anticipatory references do or do not show.

13 MR. PARTRIDGE: I understand. We haven't go to that
14 extent in the draft that we've provided thus far.

15 We will work on that with Google and get you a set
16 that's more akin to what your desires are here.

17 You had asked about having a Charge Conference.

18 I with we that you which we thought was a good idea,
19 which we thought was a good idea.

20 We're picking a jury on Thursday, May the 19th, so we
21 thought if you wanted to have an informal Charge Conference in
22 advance of trial, which again, we think makes sense, we might be
23 able to do it that day or the next day.

24 I understand you'll still be in Delaware in connection
25 with the Bench Bar Conference. So, whatever is convenient for

1 your Honor in terms of having that informal Charge Conference,
2 we'll make work.

3 THE COURT: I think we can have an informal Charge
4 Conference after the jury selection. I don't think that will be
5 a substitute for a informal Charge Conference that takes place
6 after the evidence is that's in in the trial and everyone knows
7 what the issues are.

8 I'm contemplating having a informal Charge Conference
9 at the close of all the evidence and then to have a formal on
10 the record Charge Conference later.

11 So that way we can try to work out as much at informal
12 Charge Conference as possible.

13 MR. PARTRIDGE: Okay. Understood.

14 THE COURT: And the last item here was the timing of
15 the bench trial on Inequitable Conduct and Laches.

16 Have you given that some thought?

17 MR. PARTRIDGE: At the moment we don't know who Google
18 expects to call in connection with those defenses. Our
19 witnesses will be in Delaware, obviously, during the week of the
20 jury trial from Germany with the exception of experts. So
21 they'll be available.

22 One thing we might consider is the possibility of doing
23 this bench trial while the jury is out deliberating. I know,
24 your Honor, from your experience in the Eastern District of
25 Texas, that that is a common way to manage that to minimize the

1 inconvenience to witnesses. And that might be a way to do it
2 here.

3 But frankly, at this point, we don't know who Google
4 would expect to call for the purposes of those two defenses.

5 I'm sure everybody knows that today the Supreme Court
6 took the SCA Hygiene case.

7 Obviously, at some point we're going to be seeing a
8 ruling on that. In the interim, we probably need to complete a
9 trial and get a judgment in this case so we can move forward.

10 THE COURT: So, what's Google position as to the bench
11 trial on the Inequitable Conduct and Laches issue?

12 MR. SNYDER: I anticipate that there will be complete
13 overlap, or nearly complete overlap in the witnesses that
14 testify in the laches/Inequitable Conduct aspect of the trial as
15 will testify in the first portion of the trial.

16 That raises a couple of possibilities. One, is that
17 while witnesses are on the stand, we could take outside the
18 presence of the jury any additional testimony related to
19 Inequitable Conduct or Laches. That, of course, might affect
20 our ability to finish on the originally contemplated timeline.

21 THE COURT: I don't want to do that. You can put that
22 aside.

23 MR. SNYDER: Another possibility is to do it while the
24 jury is deliberating. Google doesn't object to that. Or if
25 it's necessary after the jury comes back, do it immediately

1 thereafter.

2 I am sensitive, we are sensitive to the fact that ACI's
3 witnesses are traveling internationally.

4 THE COURT: I'm going to be sensitive in that respect,
5 too. My preference would be to do it while the jury is
6 deliberating. I would like to have in the draft Pretrial Order
7 some agreement or estimates as to how much trial time would be
8 required for those witnesses if we were to do that immediately
9 after the jury went to deliberate.

10 MR. PARTRIDGE: That makes sense to ACI, your Honor.

11 MR. SNYDER: We understand, your Honor.

12 THE COURT: I think those are the only items that I
13 that I wanted to discuss.

14 Are there other things that counsel would like to bring
15 up?

16 MR. PARTRIDGE: Nothing from us, your Honor. Thank
17 you.

18 MR. SNYDER: A couple of other issues.

19 Many of these are clarifying the procedure that you
20 intend to follow.

21 As Mr. Partridge mentioned, we are scheduled for jury
22 selection on May 19th given that you will be traveling from
23 D.C., we did want to make sure that you intended to proceed with
24 jury selection on that date?

25 THE COURT: Yes, at 1:00 o'clock on the 19th.

1 MR. SNYDER: Thank you.

2 The next issue that I'd like to raise relates to the
3 order and scope of proof. It's Judge Andrews practice that, of
4 course, the plaintiff is first, the defendant then puts on its
5 evidence related to non-infringement and invalidity and the
6 plaintiff then provides a rebuttal that is limited to the issues
7 of invalidity. Defendant then does not get a sur-reply on the
8 issue of validity.

9 I wonder whether your Honor can give us any guidance as
10 to whether that is the procedure you follow or prefer a
11 different approach to the evidence?

12 THE COURT: Again, this is something that can be
13 brought up at the Pretrial Conference. I think I am open to the
14 notion that the defendant would have a short sur-rebuttal on the
15 invalidity issues.

16 MR. PARTRIDGE: We're happy to discuss this at the
17 Pretrial Conference as to the scope of our rebuttal as well as
18 any sur-rebuttal.

19 Frankly, I haven't' though much about that at this
20 point. It was something we had intended to discuss with Judge
21 Andrews at the Pretrial Conference.

22 Your views maybe a little different than his. I think
23 it would be appropriate for us to have a conversation about that
24 at that time, and I will put that on the agenda.

25 THE COURT: Good.

1 Is there anything else that we need to discuss?

2 MR. SNYDER: Yes, a couple more issues, your Honor.

3 I raise them now in part because they may involve
4 taking some actions before the Pretrial Conference.

5 Many of ACI's witnesses are native German speakers.

6 ACI has recently indicated that they intend for those
7 witnesses to testify at trial in English, which is something we
8 object to. If they are going to testify at trial in English, we
9 strongly believe we should have an opportunity to depose them in
10 English before trial.

11 We sent a message very recently over the weekend to
12 ACI's counsel on the issue, but had not heard back from them.
13 If there are going to be a depositions taken, obviously, we need
14 to take advantage of the limited time we have before trial to do
15 that.

16 MR. PARTRIDGE: I have never heard of such a thing.

17 And I've recommended and been involved in cases with
18 witnesses from Japan, China, Korea, Germany, Italy, France.
19 I've never heard of such a thing as this.

20 We have probably three German witnesses who will
21 testify. It will probably be only three. One, I'm not sure is
22 going to be able to testify in English. He's very uncomfortable
23 with English. He may have to testify in German. The other two
24 have English as a second language.

25 This is hard for the jury to follow translated

1 testimony. They both are willing to testify in English. It
2 will require us to ask perhaps little shorter questions of the
3 witnesses so that it's more readily understood. But I think
4 they can. We handle this in both direct and cross in English as
5 long as we have an interpreter available to them in the event
6 that their words that they just simply can't get or an answer
7 that they would like to give in German.

8 And frankly, this could happen on direct. It could
9 happen on cross. I think with respect to the two witnesses who
10 are willing to try to testify in English, I think one will be --
11 will do well, I think. The other one. It will certainly be a
12 little harder for him, but it will certainly be a lot easier for
13 the jury to get this if we do this in English.

14 I had this done against me where I've had witnesses
15 that I've examined who testified in depositions in Korean or
16 Japanese and testified in English at trial, go all be it, they
17 struggled. But I never heard of what counsel is suggesting
18 here.

19 I think we should be looking toward what is going to be
20 the most convenient for the jury to understand the case. And if
21 the witnesses are able to go in English, we should certainly
22 accommodate that. And I appreciate that if there is a problem
23 on cross with them understanding and we have to do more
24 interpretation, which I don't expect to be the case, then your
25 Honor would be free to make some adjustment in trial time as a

1 consequence of that if that problem arises. I don't think it's
2 going to be an issue here.

3 THE COURT: The three witnesses were deposed in German?

4 MR. PARTRIDGE: Yes, your Honor.

5 THE COURT: Was there any objection to their testifying
6 in depositions in German as opposed to English?

7 MR. PARTRIDGE: No, your Honor.

8 THE COURT: I'm not going to allow more depositions on
9 that theory.

10 MR. SNYDER: If they were testifying at trial in German
11 as they did on their deposition, there would be no prejudice.
12 We would certainly understand that.

13 The prejudice comes from precisely the situation that
14 plaintiff's counsel just described.

15 Having put us through the burden of deposing them
16 through an interpreter during their depositions and even going
17 so far as to objecting to the use of those videotape
18 transcripts, because of the problems associated with having
19 interpreted depositions, they now want to make the tactical
20 decision of coming to trial and testifying in English to the
21 extent that they can.

22 I'm sure we can all predict how much easier it will be
23 for them on direct after they had a chance to confer with
24 counsel and discuss their testimony as you would expect any
25 witness to do with their lawyers, but not have that same

1 opportunity that comes to cross-examination.

2 This isn't just an issue of adjusting the amount of
3 time, this is about the effectiveness of our ability to
4 cross-examine them, and the prejudice of having them testify on
5 direct in English, which, of course, the jury will understand
6 better. And then essentially forcing the cross-examination
7 likely to occur in a foreign language, which the jury will not
8 understand as well.

9 THE COURT: As far as taking additional depositions,
10 I'm not going to allow it. If you want to argue at the time
11 that the deposition should have been in English, you had to
12 raise it then and not now.

13 As far as how to handle a situation where a witness is
14 able to testify in English only on direct and not on cross,
15 we'll address that when the time comes.

16 Anything else we need to address?

17 MR. SNYDER: The last issue, your Honor, relates to
18 Orders that came out last week.

19 As your Honor maybe aware, Judge Andrews ruled on
20 several pending motions, including a Motion to Exclude the
21 Plaintiffs Damages Expert.

22 That motion by Google was granted in part and denied in
23 part. And we plan to file a short -- or are at least
24 contemplating a short motion to reargue the denied portion of
25 that, because we think there some important factual

1 misunderstandings. I want to bring those to the Court's
2 attention.

3 If your Honor agrees, I think it would be prudent to
4 set a briefing schedule for that in the hopes that both an
5 opening and opposition brief could be filed before the Pretrial
6 Conference next Friday. And we will be prepared to get that
7 motion on file within the next couple of days to accommodate
8 that schedule.

9 THE COURT: To be clear, I'm treating all of Judge
10 Andrews' rulings as the law of the case.

11 And that doesn't mean that I might not depart from some
12 of them. But there's going to be a very heavy burden to
13 establish that I should change the ruling.

14 If you want to brief this question, -- was it a Daubert
15 ruling that Judge Andrews made?

16 MR. SNYDER: Yes, your Honor.

17 THE COURT: You can get together with opposing counsel
18 and propose a schedule for the briefing of that and then send
19 that proposal to my clerk, and I'll approve it or disapprove it.

20 MR. SNYDER: We will do that.

21 Thank you, your Honor.

22 THE COURT: Anything else?

23 MR. PARTRIDGE: Nothing from the plaintiff.

24 MR. SNYDER: Nothing further. Your Honor.

25 THE COURT: Okay. Thank you all.

1 Thank you for willing to come to Washington for the
2 Pretrial Conference.

3 We'll have a Minute Order of the Status Conference
4 posted tomorrow. And you can talk to Mr. Dibbs as to when the
5 transcript will be available.

6 MR. PARTRIDGE: Thank, your Honor.

7 MR. SNYDER: Thank you.

8 THE COURT: Thank you.

9 (The Status Conference concluded at this time.)

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